A **SURAINI KEMPE & ORS v. KERAJAAN MALAYSIA & ORS**

HIGH COURT MALAYA, KUALA LUMPUR
AKHTAR TAHIR J
[ORIGINATING SUMMONS NO: WA-24NCVC-2356-12-2020]
27 SEPTEMBER 2021
B [2021] CLJ JT(12)

CONSTITUTIONAL LAW: *Citizenship – Citizenship by operation of law – Citizenship of children born to Malaysian citizen mothers but out of Federation – Whether art. 14(1)(b), read together with Second Schedule in s. 1(c) of Part II of*
C *Federal Constitution discriminatory towards Malaysian citizen mothers whose children are born out of Federation – Whether ought to be read harmoniously with art. 8 of Federal Constitution – Whether word 'father' in impugned provision includes 'mother'*

D ***CONSTITUTIONAL LAW:*** *Citizenship – Locus – Citizenship of children born to Malaysian citizen mothers but out of Federation – Locus – Malaysian citizen mothers whose children are born out of Federation seeking declaration that art. 14(1)(b), read together with Second Schedule in s. 1(c) of Part II of Federal Constitution, discriminatory towards mothers – Whether locus and legitimate*
E *expectation established – Whether there were grievances*

CONSTITUTIONAL LAW: *Citizenship – Jurisdiction of court – Citizenship of children born to Malaysian citizen mothers out of Federation – Malaysian citizen mothers whose children are born out of Federation seeking declaration that art. 14(1)(b), read together with Second Schedule in s. 1(c) of Part II of Federal*
F *Constitution, discriminatory towards mothers – Whether court seized with jurisdiction to hear matter*

The first plaintiff was the President of the Association of Family Support & Welfare Selangor & Kuala Lumpur (Family Frontiers), an association that, *inter alia*, focuses on the welfare of mothers while the second to seventh
G plaintiffs were Malaysian citizen mothers, whose children were born out of the Federation. The defendants consisted of the Government of Malaysia, the Minister of Home Affairs and the Director General of the National Registration Department. In the present originating summons ('OS'), the plaintiffs sought a declaration for children born out of the Federation, to mothers who are Malaysian citizens, to be conferred citizenship by operation
H of law. The plaintiffs submitted that: (i) art. 14(1)(b), read together with the Second Schedule in s. 1(c) of Part II of the Federal Constitution ('FC') ('impugned provision'), is discriminatory towards mothers who are Malaysian citizens whose children are born out of the Federation; (ii) the impugned provision only confers citizenship to children born out of the
I Federation to fathers who are Malaysian citizens; and (iii) the impugned provision ought to be read harmoniously with art. 8 of the FC, which

guarantees the fundamental rights of equality to all persons before the law. In their respective affidavits, the plaintiffs submitted that among the grievances that they faced were: (i) having to go through a lengthy citizenship application process only to be rejected in the end with no reasons proffered; (ii) difficulties in enrolling the children in school and increased medical expenses; (iii) the fear of losing custody of the children following separation with a foreign national husband; and (iv) constant detainment and questioning about the difference in citizenship between the mother and the children. In response, the defendants argued that, *inter alia*: (i) the plaintiffs had neither *locus* nor any legitimate expectation for the citizenship of their children as the persons aggrieved were the children and not the mothers. Therefore, the mothers could only bring a representative action on behalf of the children; (ii) the court had no jurisdiction to hear the matter. The power to grant citizenship belongs to the Federal Government as the granting of citizenship is a policy matter. Furthermore, the Federal Government had ousted the powers of the court in determining citizenship issues by express provision in the FC; and (iii) the issues were non-justiciable.

Held ('father' in impugned provision must include mother of children born out of Federation):

(1) All the plaintiffs had *locus* to file this OS. The plaintiffs, as mothers, valued the Malaysian citizenship and are loyal to the country; this motivated them to file the OS. There were valid issues to be determined and the discrimination against the mothers were apparent. The grievances faced by the plaintiffs were real and not imaginary. The plaintiffs also had a direct interest in the determination of the issues. It was illogical to argue that only the children were aggrieved and not the mothers. Whether the plaintiffs could succeed in their action was not a criteria to determine whether they had a *locus* or not. The legitimate expectation of the mothers in this case derived from natural instinct to give the best to their children. Furthermore, the plaintiffs' grievances had not been disputed by the defendants. By not disputing these grievances, the defendants accepted them as real and not mere conjecture. (paras 18, 21, 22, 35, 52 & 53)

(2) The ouster clause in s. 2 of Part III of the Second Schedule of the FC only applies to an application of citizenship to the Minister *ie* under art. 15 of the FC, in which case the Minister has the power whether to grant or reject the application. This exercise of discretion by the Minister is not subject to review by the court. However, the granting of citizenship by operation of law falls under art. 14 of the FC. Under this provision, citizenship is given as of right and not subject to the discretion of the Minister. To oust the jurisdiction of the court would mean the powers to legislate, execute and adjudicate would lie in the hands of the Executive. The court was not seeking to change the policy or rewrite the law which has already been enacted by the Federal Government. What

A the court was endeavouring was to apply the existing law and policy already in force in a manner which would find a remedy to the grievances of the plaintiffs. This, the court was surely empowered to do. (paras 30-32 & 34)

B **(3)** In the extracts of the Hansard, it could not be detected, from the debates in Parliament, that there was a conscious effort to discriminate between the mother and father in granting citizenship. The focus of the debate was whether citizenship should be given or not given to children born out of the Federation. The impugned provision must reflect the provision of equality before the law and equal protection of the law, as C provided under art. 8(1) of the FC. There was apparent discrimination in the impugned provision. The defendants, when directed to justify the discrimination, failed to provide any. It could be safely assumed that there was none. (paras 44, 49 & 50)

D **(4)** The court declared that: (i) the word 'father' in the impugned provision includes the mother and, therefore, the children of the second to seventh plaintiffs, and all other women similarly circumstanced, are entitled to citizenship by operation of law if all the procedures to those followed by the father are adhered to; (ii) the time to comply with the necessary procedures are to be extended accordingly; and (iii) the authorities are E directed to issue the relevant documentation to effectuate the declaration of the court. (para 57)

Case(s) referred to:

Alma Nudo Atenza v. PP & Another Appeal [2019] 5 CLJ 780 FC ***(refd)***

Danaharta Urus Sdn Bhd v. Kekatong Sdn Bhd [2004] 1 CLJ 701 FC ***(refd)***

F *Dato' Raja Ideris Raja Ahmad & Ors v. Teng Chang Khim & Ors [2012] 2 CLJ 288 CA* ***(refd)***

Dato' Seri Ir Hj Mohammad Nizar Jamaluddin v. Dato' Seri Dr Zambry Abdul Kadir; Attorney General (Intervener) [2010] 2 CLJ 925 FC ***(refd)***

Datuk Seri Anwar Ibrahim v. Kerajaan Malaysia & Anor [2021] 8 CLJ 511 FC ***(refd)***

Indira Gandhi Mutho v. Pengarah Jabatan Agama Islam Perak & Ors [2013] 7 CLJ 82 G *HC* ***(refd)***

Indira Gandhi Mutho v. Pengarah Jabatan Agama Islam Perak & Ors And Other Appeals [2018] 3 CLJ 145 FC ***(refd)***

Loh Kooi Choon v. Government of Malaysia [1975] 1 LNS 90 FC ***(refd)***

Tan Sri Hj Othman Saat v. Mohamed Ismail [1982] 1 LNS 2 FC ***(refd)***

H **Legislation referred to:**

Federal Constitution, arts. 8(1), (2), (5), 14(1)(b), 15(2), Second Schedule Part II s. 1(c), Part III s. 2

Rules of Court 2012, O. 18 r. 19

For the plaintiffs - Gurdial Singh Njar, Joshua Andran & Abraham Au; M/s Joshua Alvin I *Khoo & Yong*

For the defendants - Liew Horng Bin; SFC

Reported by Najib Tamby

JUDGMENT

Akhtar Tahir J:

Introduction

[1] This is an originating summons ("OS") filed by the president of the association commonly referred to as the Family Frontiers; an association (amongst others) looking after the welfare of mothers as the first plaintiff and a group of mothers who are Malaysian citizens and mothers of children born out of the Federation as the second to seventh plaintiffs ("all will hereafter be collectively referred to as the plaintiffs") against the Government of Malaysia as the first defendant, the Menteri Hal Ehwal Dalam Negeri Malaysia as the second defendant and the Ketua Pengarah Jabatan Pendaftaran Negara Malaysia as the third defendant ("hereafter to be collectively referred to as the defendants").

The Brief Facts

[2] The plaintiffs are seeking a declaration of court that children born out of the Federation to mothers who are Malaysian citizens to be conferred citizenship by the operation of law.

[3] The provision of the law applicable to citizenship of the children born out of the Federation is contained in art. 14(1)(b) read together with the Second Schedule, in s. 1(c) of Part II of the Federal Constitution ("hereinafter to be referred to as the impugned provision").

[4] For ease of reference, the impugned provision is reproduced here and is as follows:

> (1) Subject to the provisions of this part, the following persons are citizens by operation of law, that is to say:
>
> (a) every person born before Malaysia Day who is a citizen of the Federation by virtue of the provisions contained in Part I of the Second Schedule; and
>
> (b) **every person born on or after Malaysia Day, and having any of the qualifications specified in Part II of the Second Schedule**.
>
> PART II
>
> [Article 14 (1) (b)]
>
> CITIZENSHIP BY OPERATION OF LAW OF PERSONS BORN ON OR AFTER MALAYSIA DAY
>
> 1. Subject to the provisions of Part III of this Constitution, the following persons born on or after Malaysia Day are citizens by operation of law, that is to say:
>
> (a) every person born within the Federation of whose parents one at least is at time of the birth either a citizen or permanently resident in the Federation; and

A *(b) every person born outside the Federation whose father is at the time of the birth a citizen and either was born in the Federation or is at the time of the birth in the service of the Federation or of a State; and*

(c) every person born outside the Federation whose father is at the time of the birth a citizen and whose birth is, within one year of its occurrence or within such
B *longer period as the Federal Government may in any particular case allow, registered at a consulate of the Federation or, if it occurs in Brunei or in a territory prescribed for this purpose by order of the Yang di-Pertuan Agong, registered with the Federal Government*

[5] The plaintiffs contend that the impugned provision is discriminatory
C towards mothers who are Malaysian citizens whose children are born out of the Federation because the impugned provision only confers citizenship to children born out of the Federation to fathers who are Malaysian citizenship.

[6] The plaintiffs are now requesting the court to interpret the impugned provision to be read harmoniously with art. 8 of the Federal Constitution
D which guarantees the fundamental rights of equality to all persons before the law.

[7] Article 8 of the Federal Constitution *inter alia* provides as follows:

(i) All persons are equal before the law and entitled to the equal
E protection of the law.

(ii) Except as expressly authorised by this Constitution, there shall be no discrimination against citizens on the ground only of religion, race, descent, place of birth or gender in any law or in the appointment to any office or employment under a public authority or in the administration of any law relating to the acquisition,
F holding or disposition of property or the establishing or carrying on of any trade, business, profession, vocation or employment.

[8] The OS of the plaintiffs is supported by the affidavits filed by all the plaintiffs. In her affidavit, the first plaintiff affirms that Malaysian mothers of children born out of the Federation with a foreign husband have to apply
G for citizenship of the children by virtue of art. 15(2) of the Federal Constitution which is not only a lengthy process but the applications are often rejected as the conferment of citizenship is subject to the discretion of the Minister.

[9] The rejection of citizenship has resulted in some of the children in the
H same family being non-citizens whereas the other children born in the Federation being citizens. This has caused children who are non-citizens being deprived of the privileges of the children who are citizens which includes education, healthcare, travel apart from mental suffering. These hardships have been compounded during the pandemic where there is a
I restriction on travel.

[10] The affidavit of the second plaintiff highlights the practical problems faced by one of her children born in Zambia of her husband who is a Zambian national although she was out of the country for only a short period of time. Her application for citizenship for her child under art. 15(2) of the Federal Constitution was rejected after two years with no reasons given. The Registration Department has also not responded to her application for an identity card even after three years. This has caused difficulty for the second plaintiff in enrolling her child in school, increased medical expenses and other severe hardships.

[11] The same hardships faced by the second plaintiff are also faced by all the other plaintiffs who have all filed separate affidavits highlighting their difficulties. The third plaintiff has an added difficulty as she is separated from her husband and she fears she will lose custody of her child to the husband who is a foreign national. The seventh plaintiff whose children were born in Thailand has been constantly detained and questioned about the difference in citizenship between her and her children.

[12] The defendants responded to the OS by filing an application to strike out the OS under O. 18 r. 19 of the Rules of Court 2012 on various grounds. The court after considering all the facts and both written and oral submissions had dismissed the application of the defendants. On appeal, the Court of Appeal affirmed the decision of the court.

[13] On a direction of court, the defendants filed affidavits in reply to the OS. The Home Minister in his affidavit reiterated what was argued in the application to strike out that the court had no jurisdiction to hear the matter, the issues were non-justiciable and the plaintiffs had neither a *locus* nor were entitled to any legitimate expectation for citizenship for their children.

[14] In his affidavit in reply, the Director General of the National Registration Department affirmed that anything to be said would be argued by the Federal Counsel in open court.

The Issues

[15] After considering the affidavits filed in support of the OS as well as affidavits opposing the OS and hearing and considering both written and oral submissions of both parties, the court has narrowed down the main issues to be as follows:

(i) The *locus* of the plaintiffs;

(ii) The jurisdiction of the court and the justiciability of the issues;

(iii) The proper application of the impugned provision.

[16] Issues (i) and (ii) have been decided during the application to strike out the OS and have been affirmed by the Court of Appeal. In addition to the grounds which had been prepared earlier, the court will further elaborate on the issues for the sake of completeness.

Locus

[17] In a further submission, the defendants have raised various issues of the plaintiffs' *locus* in bringing this action. The first is that citizenship is a privilege rather than a right and therefore the plaintiffs are estopped from making a claim to the citizenship for their children. The short reply of the court to this argument is that, even if the granting of citizenship is a privilege, it must be offered without discrimination. It does not address the discrimination issue.

[18] The second issue raised on *locus* by the defendants is that the persons aggrieved are the children who have not been given citizenship and not the mothers, therefore the mothers can only bring a representative action on behalf of the children. It is noted by the court that the mothers have highlighted in their affidavits the grievances they are facing for the children not being granted citizenship. This includes enrolment into school, additional expenses in education, health care and many other problems. The defendants in their affidavit have not challenged any of these grievances faced by the mothers. So it is illogical to argue that only the children are aggrieved not the mothers. By not disputing the grievances faced by the plaintiffs, the defendants have accepted the grievances faced by the mothers as real and not mere conjecture.

[19] The third issue raised by the defendants is that the plaintiffs are abusing the process of law by coming to the courts only after their application for citizenship have been rejected under art. 15 of the Federal Constitution. This argument can be brushed aside simply on the strength of the defendants' own argument that the plaintiffs have to resort to court after being denied citizenship for their children. There is no abuse and in fact, filing this OS is the proper and legal procedure.

[20] In the court's view, the proper principles to determine *locus* is that the issues to be determined by the court should not be abstract, hypothetical or academic and the person bringing the action must have an interest in the determination of the issues. (See cases of *Datuk Seri Anwar Ibrahim v. Kerajaan Malaysia & Anor* [2021] 8 CLJ 511, *Tan Sri Hj Othman Saat v. Mohamed Ismail* [1982] 1 LNS 2; [1982] 2 MLJ 177, *Dato' Raja Ideris Raja Ahmad & Ors v. Teng Chang Khim & Ors* [2012] 2 CLJ 288; [2012] 5 MLJ 490).

[21] In this case, the grievances faced by the plaintiffs are real and not imaginary and further, these grievances have not been disputed by the defendants. The plaintiffs also have a direct interest in the determination of the issues.

[22] Whether the plaintiffs can succeed in their action is not a criteria to determine whether they have a *locus* or not. In this case, it is the court's ruling that there are valid issues to be determined and the plaintiffs have an interest in the determination of these issues. Therefore, all the plaintiffs have a *locus* to file this OS.

Court's Jurisdiction And Justiciability Of The Issue

[23] On court's jurisdiction and justiciability, the crux of the defendants' argument against the court hearing the matter is founded on the doctrine of separation of powers. The principle of separation of powers in the argument of the defendants has been ingrained in the Federal Constitution of Malaysia.

[24] The doctrine of separation of powers originated from the French social and political philosopher Charles-Louis de Secondat (Montesquieu). In short, Montesquieu asserted that the three powers of the Government; the Executive, the Legislature and Judiciary must be separated and each must act independently. This was designed to prevent powers from being held by a single power of the Government leading to despotism.

[25] The defendants argue that the power to grant citizenship belongs to the Federal Government as the granting of citizenship is a policy matter. Further, the Federal Government has ousted the powers of court in determining citizenship issues by express provision in the Federal Constitution.

[26] Slightly diverting from the matter at hand, in the court's view, this argument of the defendants of separation of powers is a misnomer simply because in practice, in Malaysia, following the English *Westminster* system, there seems to be no separation of powers between the Executive which forms the Federal Government and the Legislature. This is because the Prime Minister and all the Ministers forming the Executive or the Federal Government must be members of the Legislature (either House of Parliament).

[27] The Prime Minister must not only be a member of the Legislature but must enjoy the majority support in the Legislature especially in Dewan Rakyat where the laws of the countries are mainly debated. Most of the legislation, if not all emanate from the Executive. This legislation is always invariably passed as it can be passed on the basis of simple majority which the Prime Minister already has. In short, in the Malaysian context, the Executive not only executes the law but also legislates them. This goes against the strict concept of separation of powers by which the Executive is just to execute the law which is legislated by the Legislature.

[28] The only safeguard against this practice of overlapping of powers of the Executive and Legislature is the powers vested in the Judiciary which is not affiliated to either the Legislature or the Executive. The courts forming the Judiciary are not only empowered to interpret the law but also to apply the law in a manner that will uphold justice and the spirit of Federal Constitution which is the supreme law of the land.

[29] The defendants contend that the court's power in determining citizenship issues has been ousted *inter alia* by s. 2 of Part III of the second Schedule of the Federal Constitution. This provision read as follows:

PART III

[Article 31]

SUPPLEMENTARY PROVISIONS RELATING TO CITIZENSHIP

THE MINISTER

1. The functions of the Federal Government under Part III of this Constitution shall be exercised by such Minister of that Government as the Yang di-Pertuan Agong may from time to time direct, and references in this Schedule to the Minister shall be construed accordingly.

2. A decision of the Federal Government under Part III of this Constitution shall not be subject to appeal or review in any court.

3. (Repealed).

[30] On this argument of the defendants, I agree with the submission of the plaintiffs' counsel that this ouster clause only applies to an application of citizenship to the Minister, for example, under art. 15 of the Federal Constitution in which case the Minister has a power whether to grant or reject the application. This exercise of discretion by the Minister is not subject to be reviewed by court.

[31] The granting of citizenship by operation of law however falls under art. 14 of the Federal Constitution. Under this provision, the citizenship is given as of right and not subject to the discretion of the Minister.

[32] It is ironic that the defendants are seeking to oust the jurisdiction of court in determining this OS by using the concept of separation of powers. To oust the jurisdiction of court would mean the powers to legislate, execute and adjudicate would lie in the hands of the Executive. Montesquieu would be turning in his grave knowing that his theory is being used to do the exact opposite of what he had advocated.

[33] In summing up on this issue, the court reiterates that it is not seeking to change the Federal Government's policy of granting citizenship. The Government's policy on citizenship of children born out of Federation had already been decided during the time of the second Prime Minister of Malaysia. The defendants have painstakingly adduced extracts of the Hansard which show that the Government had decided to adopt the principle of *jus sanguinis* to confer citizenship to the children born out of the Federation on and above to children born in the Federation. To this end, art. 14(1)(b), the impugned provision was enacted.

[34] This court further reiterates that it is not seeking to change the policy or rewrite the law which has already been enacted by the Federal Government. What the court is endeavouring to do is applying the existing law and policy already in force in a manner which will find a remedy to the grievance of the plaintiffs. The courts are surely empowered to do this.

[35] The court further adds that in this case, the grievances of the plaintiffs are real and the defendants must not bury their head in the sand like an ostrich and state that there is no grievance or discrimination. The court has already stated that the discrimination against the mothers is apparent.

Interpretation And Application Of The Impugned Provision

[36] In applying the law, it is necessary to interpret the impugned provision. Both parties have put forward extensively how the impugned provision should be applied and interpreted.

[37] The defendants have contended that the court should adopt the literal and pedantic interpretation and give effect to the clear and unambiguous wordings of the impugned provision. This approach might hold true in the interpretation of normal documents like agreements or contracts where the court must give effect to the express words as stated.

[38] However, the same approach cannot be applied in interpreting the Federal Constitution which is the supreme law of the land. This has been highlighted in the case of *Alma Nudo Atenza v. PP & Another Appeal* [2019] 5 CLJ 780 where it was stated as follows:

> It is well-established that "a constitution must be interpreted in light of its historical and philosophical context, as well as its fundamental underlying principles". (See: *Indira Gandhi Mutho v. Pengarah Jabatan Agama Islam Perak & Ors And Other Appeals* [2018] 3 CLJ 145; [2018] 1 MLJ 545 at para. [29]). It is not to be interpreted in a vacuum without regard to the thinking in other countries sharing similar values. (See: *The State v. Khoyratty* [2006] UKPC 13 at para. [29]). The importance of the underlying values of a constitution was noted by the Judicial Committee of the Privy Council in *Matadeen v. Pointu* [1998] UKPC 9 with these words:
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> > ... constitutions are not construed like commercial documents. This is because every utterance must be construed in its proper context, taking into account the historical background and the purpose for which the utterance was made. The context and purpose of a commercial contract is very different from that of a constitution. The background of a constitution is an attempt, at a particular moment in history, to lay down an enduring scheme of government in accordance with certain moral and political values. Interpretation must take these purposes into account.

[39] Further, if the literal approach as suggested by the defendants is to be adopted, the court's role will be downgraded to rubberstamping the provision as enacted without actually addressing the mind to the actual purpose the provision was enacted or applying the provision in a fair and just manner.

[40] The defendants further contend that the impugned provision is not discriminatory and does not violate art. 8. For this proposition, the defendants rely on the cases of *Maria Chin* and *Loh Kooi Choon v. Government of Malaysia* [1975] 1 LNS 90; [1977] 2 MLJ 187 which according to the

defendants, state that each provision of the Federal Constitution is of equal standing and not subordinate to any other. The short answer to this argument is that both these cases are not applicable to the facts of this case and in no way support the proposition of the defendants that each of the provisions of the Federal Constitution should be read disjointedly.

[41] If the defendants' approach of interpretation were to be adopted, the Federal Constitution will be converted into a patchwork of disjointed provisions. This is clearly not the intention of the drafters of the Federal Constitution. The Federal Constitution is crafted and drafted in such an organised manner even in the numbering and placement of the various articles that the Federal Constitution that it is meant to be applied and interpreted in an orderly and harmonious manner.

[42] It is the court's ruling therefore that all provisions of the Federal Constitution are to be interpreted harmoniously and purposively so as not to render any provision of the Federal Constitution as otiose or nugatory. In short, all provisions of the Federal Constitution should be interpreted in accordance with each other and in fact must be reflective of each other.

[43] The principle of harmonious application is best illustrated in the case of *Danaharta Urus Sdn Bhd v. Kekatong Sdn Bhd* [2004] 1 CLJ 701 where it was stated as follows:

> If art. 160(2) is not interpreted together with s. 3(1) it would render the section otiose in so far as its power to modify the common law in the future is concerned. This will militate against one of the recognised canons of construction of a Constitution which is that if two constructions are possible the Court must adopt the one which will ensure the smooth and harmonious working of the Constitution and eschew the other which will lead to absurdity or give rise to practical inconvenience or make well-established provisions of existing law nugatory (see *State of Punjab v. Ajaib Singh* AIR [1953] SC 10).

(see also the cases of *Dato' Seri Ir Hj Mohammad Nizar Jamaluddin v. Dato' Seri Dr Zambry Abdul Kadir; Attorney General (Intervener)* [2010] 2 CLJ 925; [2010] 2 MLJ 285, *Alma Nudo Atenza v. PP & Another Appeal* [2019] 5 CLJ 780; [2019] 4 MLJ 1 and *Indira Gandhi Mutho v. Pengarah Jabatan Agama Islam Perak & Ors* [2013] 7 CLJ 82; [2013] 5 MLJ 552).

[44] In this case, the impugned provision must reflect the provision of equality before the law and equal protection of the law as provided for under art. 8(1) of the Federal Constitution.

[45] There is a cogent reason why the impugned provision must be reflective of art. 8. The cogent reason being art. 8 falls under fundamental liberties. It is to be noted that principles of fundamental liberties are based on universal norms that transcend any law. Even if these universal norms are not adopted formally, all provisions of law must be still subject to these universal norms. Non-compliance with fundamental liberties will lead to anarchy and dissatisfaction amongst members of the society.

[46] In the Malaysian context, not only these universal norms have been adopted in the Federal Constitution but they have been given a higher pedestal than all the other provisions of the Federal Constitution. This is evidenced by the fact that they have been placed at the very beginning before all other provisions. In short, any breach to these fundamental liberties should be viewed restrictively.

[47] In *Indira Gandhi Mutho v. Pengarah Jabatan Agama Islam Perak & Ors And Other Appeals* [2018] 3 CLJ 145; [2018] 1 MLJ 545 it was stated as follows:

> *This is particularly so in respect of art. 12(4), which falls under the fundamental liberties section in Part II of the Constitution.* As was held in *Lee Kwan Woh v. PP* [2009] 5 CLJ 631; [2009] 5 MLJ 301:
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> > … The Constitution is a document *sui generis* governed by interpretive principles of its own. In the forefront of these is the principle that its provisions should be interpreted generously and liberally. *On no account should a literal construction be placed on its language, particularly upon those provisions that guarantee to individuals the protection of fundamental rights.* In our view, it is the duty of a court to adopt a prismatic approach when interpreting the fundamental rights guaranteed under Part II of the Constitution. When light passes through a prism it reveals its constituent colours. In the same way, the prismatic interpretive approach will reveal to the court the rights submerged in the concepts employed by the several provisions under Part II.
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> (emphasis added)

[48] The court is clear that art. 8 is not absolute as art. 8(2) begins with the phrase "except as expressly authorised by the Constitution". In fact, in art. 8(5), these exceptions are expressly provided for. In the court's view, as stated in art. 8(2) the exceptions must be stated expressly as being an exception. The exception cannot be by way of implication for example as in this case, it cannot be implied, that by using the word father in the impugned provision it is meant to discriminate. For there to be an express exception, the impugned provision should start with a phrase like "notwithstanding art. 8".

[49] In fact, in the extracts of the Hansard, the court cannot detect from the debates in Parliament that there was a conscious effort to discriminate between the mother and father in granting citizenship. The focus on the debate was whether citizenship should be given or not to children born out of the Federation. The sentiment in the debate was to give citizenship based on loyalty, allegiance and attachment to the country.

[50] Further, the court in ruling that there was apparent discrimination in the impugned provision, the court had directed the defendants to justify the discrimination. The defendants failed to provide any justification whatsoever

A and therefore it can safely be assumed there is none. Even if there is no express authorisation for the discrimination, at least, with justifications given, the court could have interpreted the impugned provision in the light of the justifications.

B **[51]** This brings forth the next point of legitimate expectation. The argument is that the country has ratified international treaties and conventions intending to give equal rights without consideration of gender.

[52] To me, this legitimate expectation is not derived from any international treaties or convention. This legitimate expectation of the mothers in this case is derived from natural instinct to give the best to the C child. It is only natural that a parent desires that everything of value be inherited by their children be it material or otherwise.

[53] In this case, the plaintiffs as mothers, valued the Malaysian citizenship and are loyal to the country and this has motivated them to file this OS. D Given a choice, these mothers would have avoided the courts at all costs. This is the very criteria the impugned provision was promulgated to reward loyalty. It could be the word father is used as at that point of time it was difficult to travel and usually it was the fathers who had to travel out of the Federation. Now anyone can travel easily.

E **[54]** The Federal Constitution is therefore to be interpreted to meet the needs of the current time and the theory of this interpretation is called the organic theory. The acceptance of this theory was stated in the case of *Dato' Seri Ir Mohammad Nizar Jamaluddin* (*supra*) as follows:

> [26] *NS Bindra's Interpretation of Statutes* (10th ed) at p. 1295 speaks of two F theories of interpretation of Constitution namely, the mechanical and organic theories. At p. 1296 it stated that organic theory is to be preferred. 'The organic method requires us to see the present social conditions and interpret the Constitution in a manner so as to resolve the present difficulties'. From the authorities cited above our courts are inclined to the organic theory in the interpretation of the Constitution.

G **[55]** A final point to be addressed in the interpretation of the impugned provision is a recent decision of the apex court which decided that children born out of illegitimate liaisons are to follow the citizenship of the mother. The question this decision raises is, does this means children born out of H these illegitimate liaisons out of the Federation will be granted automatic citizenship following the citizenship of the mother? This will give rise to ignominy that the rights of children born of illegitimate liaisons are above those born out of legitimate liaisons.

I

Conclusion

[56] Having regards to the anomaly that has arisen in interpreting the impugned provision literally or mechanically, the court concludes that the father in the impugned provision must include the mother of the children born out of Federation.

[57] In the upshot, the court makes the following declaration that:

(i) On the proper reading of the impugned provision, the word father includes the mother and therefore the children of the second to seventh plaintiffs and all other women who are faced with a similar situation are entitled to citizenship by operation of law if all the procedures similar to those followed by the father are adhered to.

(ii) Time to comply with the necessary procedures are to be extended accordingly.

(iii) All the authorities are directed to issue the relevant documentation to effectuate the declaration of the court.